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UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

UNITED STATES OF AMERICA, Appellee. v. JAMES L. SUGGS, Appellant.	:	Criminal No. 23,092
UNITED STATES OF AMERICA, Appellee, v. AUGUSTUS R. HARRIS, JR., Appellant.	:	Criminal No. 23,201

Appeal from the United States District Court
for the District of Columbia

SUPPLEMENTAL BRIEF OF APPELLANT HARRIS

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ISSUES PRESENTED

1. Was it reversible error for the trial judge to deny Appellant's motion for a mental examination in the face of counsel's indication of an inability to cooperate?

2. Was it error to deny Appellant's motion for acquittal when the government failed to produce the witness whose testimony was primarily responsible for Appellant's indictment?

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INTRODUCTION

This Supplemental Brief on behalf of Appellant Harris is submitted to raise certain issues which were not briefed in Appellant's previous briefs, but which present substantial issues concerning the fair trial of Appellant Harris. Leave to file this brief was granted by order of the Court following Appellant's motion of April 13, 1970.

I. Appellant Harris was denied due process of law when the trial judge refused to grant a hearing of the accused's competence to stand trial

Immediately prior to commencement of the trial in the instant case, counsel for Appellant Harris moved for a dismissal on the grounds of lack of a speedy trial and for a mental examination to determine the accused's competence to stand trial. The following exchange ensued:

> "The Court: You better put on the record what detriment there is to the defendant in the lack of a speedy trial.
>
> ***
>
> "Mrs. Roundtree:...Next, in the interim, there has been some change in the mental condition in my opinion of the defendant Harris and I would say to the Court that over the past month since he has been incarcerated we have made several attempts at the D.C. jail to talk with him where he sent word and refused to talk to us and I am advised that he was then refusing to talk to anyone.
>
> "This morning I made an attempt in the cell block to talk with him to get through, to try and quickly prepare for this trial and I would say to this Court that it was an inadequate communication with the defendant.
>
> "Among other things, he related to me that he was held-- he doesn't know how he came back to the jail off bond and that he knows that for 30 days he was in a hole or some kind of strict confinement. He doesn't know how he got there. I, of course, today, have not had a chance to develop this or to investigate it at the jail. But I do know that when I have gone there the guards advised me that he did not wish to see me or anyone.
>
> "The Court: All right. The motion will be denied.
>
> ***

"Mrs. Roundtree: Your Honor may I enquire if the Court understood that as a part of my motion, I was indicating that I asked a competency examination as to Harris?

"The Court: Yes, I do. It will be denied as untimely. The Court recognizes that counsel, Mrs. Roundtree, has had difficulty with the defendant but the Court is not going to take cognizance of the fact that that indicates any mental competency [sic]." (Tr. 11, 12, 15)

Denial of this motion forms one of the grounds for a reversal of the conviction asserted in this supplementary brief.

The criteria by which the trial court is to judge competency of the accused to stand trial are laid down in 24 D.C. Code Sec. 301, providing for judicial findings of incompetence or commitment in cases in which "it shall appear to the court...from prima facie evidence submitted to the court that the accused is of unsound mind or is mentally incompetent so as to be unable to understand the proceedings against him or properly to assist in his own defense..."

Appellant's attorney in this case represented to the court that Appellant had refused to communicate with counsel for a month, and that there were indications (from the jail guards) that he had refused to speak to anyone. Appellant contends that these representations by counsel were sufficient evidence of an inability to cooperate in his own defense to require the judge, at the minimum to hold a hearing to satisfy himself as to whether a mental examination was warranted. The fact that Appellant was said to have refused to talk with anyone is

surely indicative of the possibility that he was suffering from a mental disorder, rather than merely disgruntled with his own counsel, or merely occupied with other pursuits at the times his counsel attempted to interview him. The further indications of disorientation, in that Appellant was represented as having stated he didn't know how he had returned to jail from bond, and did not know precisely how he got into strict confinement certainly raise sufficient doubt to require investigation by the Court, rather than the peremptory denial of the motion that was made. In conclusion, the best that can be said of the Appellant's mental condition on the day the trial started was that it was questionable.

The reason given by the trial court for denial of the motion was that it was untimely. This is clearly not so, however, since only that morning had counsel been able to talk to her client, and it was only then that she acquired enough information to allow her to represent to the Court that the Defendant may not have been competent. Compare this to Mitchell v. United States, 114 U.S. App. D.C. 353, 316 F.2d 354 (1963) in which the competency motion was first made and denied on the morning the trial began. The Court held that the denial on grounds of untimeliness of the motion was error, since trial counsel came into possession of information suggesting incompetence only that same morning in conferring with the Defendant, even though there had been some suggestions of incompetence prior to that time.

It is plain that an accused has an absolute right to an informed finding as to competency. "Under the statute the accused always had an absolute right to compel a full evidentiary hearing on the competency issue." Green v. United States, 389 F.2d 949, 128 U.S. App. D.C. 408 at 414 (1967), decided en banc.

Not only does the accused enjoy an absolute right to the hearing, he is entitled to an informed decision, with the full range of benefits provided by the adversary system. "In determining competency for trial, the court must have adequate information on which to base a decision." Green v. United States, supra, p. 414. See also Blunt v. United States, 128 U.S. App. D.C. 375, 389 F.2d 545 (1967) and Holloway v. United States, 119 U.S. App. D.C. 396, 343 F.2d 265 (1964).

Clearly, Appellant was not accorded his right to an informed finding on the subject of competence; and hence the very real possibility exists that his trial was conducted while he was unable to assist in his own defense-- a rudimentary requirement of due process.

The mere fact that Appellant was not able to prove himself incompetent as the trial commenced, is no reason for concluding that the trial court correctly surmised that he was competent. For if to be entitled to a hearing every accused was required to prove that he was incompetent beyond doubt, the right would

have no meaning, since he can only prove his incompetence by introducing evidence at a hearing. This argument is articulated by the Court in Cannady v. United States, 122 U.S. App. D.C. 120, 122, 351 F.2d 817 (1965) in which the Court states: "It cannot reasonably be supposed that Congress intended to require the accused to produce, in order to get a mental examination enough evidence to prove that he is incompetent or irresponsible. That is what the examination itself may, or may not, produce." (quoting Mitchell v. United States, 114 U.S. App. D.C. 353 at 359, 316 F.2d at 360 (1963).

In Wider v. United States, 121 U.S. App. D.C. 129, 348 F.2d 358 (1965) this Court held, per curium, that the Court was required to exercise its discretion by way of a further investigation into the competency of the defendant to stand trial upon counsel's statement about his "inability to communicate effectively with appellant" (121 U.S. App. D.C. at 132) even in the face of a medical report certifying Appellant's competence, and even when trial counsel did not explicitly except to the finding of competence.

In this case, the trial court did not even take a few minutes to interrogate the defendant himself or hold even the most cursory of hearings, much less to undertake the full exploration of the question that is required by law. Perhaps a few questions would

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have revealed that Appellant was totally unconscious of his surroundings or unaware of the nature of the charges against him. But at this late date, there is no way of knowing.

The remedy to the trial court's error cannot, therefore, be to remand this case for a hearing on the question of competency, nunc pro tunc. No evidence on the subject of Harris' competence on February 20, 1969, could be produced now. Under ordinary circumstances, the remedy indicated would be reversal and remand for a new trial, preceded by the statutorily required competency hearing or examination. Wider v. United States, 121 U.S. App. D.C. 129, 348 F.2d 358 (1965), Dusky v. United States, 362 U.S. 402 (1960), Blunt v. United States, 128 U.S. App. D.C. 375, 389 F.2d 545 (1967). Heard v. United States, 263 F. Supp. 613 (D.C.D.C. 1967), Holloway v. United States, 119 U.S. App. D.C. 396, 343 F.2d 265 (1964).

Remand for new trial would, therefore, be appropriate, were it not for the fact that Appellant had already, at the time of the first trial, been denied his right to a speedy trial. To retry him at this late date would constitute a gross injustice. The indicated action is reversal and dismissal of the charges against Appellant.

II. Appellant was denied his right to a fair trial by the Government's failure or refusal to produce a key witness

At the close of the government's opening statement, counsel for Harris moved for a judgment of acquittal on the grounds that the government had given no indication of any intent to employ the testimony of one Kathleen Von Bargen, who had given the crucial evidence before the grand jury resulting in the indictment. (Tr.78) As counsel put it, "This is the basis on which Mr. Harris, Mr. Augustus Harris was re-indicted and we say at this time that if her testimony is not used or if she is not used then the indictment against Mr. Harris, the subsequent indictment against Mr. Harris must fall because it was on this basis and only on this basis that he was re-indicted. "This motion was renewed in essentially the same form at the close of the Government's case. (Tr. 901 et seq.) The record discloses that the government had subpoenaed Kathleen von Bargen, but the marshall was unable to locate her at the address given, and his further investigations proved fruitless in finding her. (Tr. 66 and 361).

The question is therefore framed, as to whether the government may secure an indictment through the testimony of a witness, and then proceed to a conviction in the absence of that witness. It appears that all of the witnesses who testified for the government at Harris' trial were known to the government, and the substance of their testimony was known to the government since the very early stages of its investigation of this case. On the strength of the information gleaned from these

CONCLUSION

WHEREFORE, Appellant urges reversal of his conviction.

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REPLY BRIEF OF APPELLANTS

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Cases principally relied upon are marked with an Asterisk.

I. The Identification Procedure

The Government asserts in its Brief that "It is apparent that Mr. Benson actually was provided with a number of loose photographs, but that he recalled only the two he was able to identify - those of Appellant Suggs and a neighbor." (Gov't Brief, p. 11). What is apparent to the Government is not so apparent to Appellant. Witness Benson was singularly steadfast in his testimony as to how many loose pictures there were:

A. No, they put two pictures in front of me.

Q. They put two pictures?

A. Correct.

Q. After you had gone through all the photographs, they finally came forward with two photographs, is that right?

A. They put two in front of me. (Tr. 121)

Q. How many other photographs were laying in front of you during the period of time that you were at the Robbery Squad Headquarters on November 1?

A. No more that I can think of.

Q. No more?

A. No more.

Q. Just those two?

A. Just those two. (Tr. 402)

Q. Now, which is correct? There was only two

there, one of Mr. Suggs and one of another man, or were there more?

A. No, there were just two. (Tr. 447)

Q. And in addition to the books were there any other pictures that were, or photographs that were not in books that you looked at?

A. It was two laying in front of me. (Tr. 486).

The government now seeks to have this Court conclude, in the face of this unequivocal testimony by its own witness, that the witness was "actually . . . provided with a number of loose photographs" based on the testimony of two police officers to that effect. This truth is far from apparent, and unfortunately, from this remote vantage point it seems likely that we will never know for sure precisely what happened on this occasion over two years before trial. If the witness is correct in his version, Appellant submits he has made out a case of prejudice meeting the criteria of Simmons* and other authority cited by Appellant and the government. Assuming, however, that the Government is correct in its surmize that the witness simply forgot, the question this court must consider is whether this is not indicative of precisely the sort of prejudice complained of by counsel at trial (Tr. 14) and by Appellant in his Brief - that the memories of the witnesses were so deteriorated as to render fair trial impossible at that point so remote from the events about which testimony was to be offered.

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* Simmons v. United States, 390 U.S. 377 (1968).

The day following this first identification, witness Benson was shown a series of six photos, of which he identified that of Suggs. There is no contention that any suggestion was made to the witness which person was suspect, but since the same individual had been picked out by the witness only the day before there is small wonder in his doing so on this occasion, and appellant is at a loss to find any legitimate reason (and the Government's brief does not suggest one) for the second showing, other than to fix the prior identification more firmly in the mind of the witness.

As for the subsequent in-person viewing at the station-house, the Government correctly points out that such procedures have been allowed (although never approved) by this Court in cases arising before Stovall.** In this case, unlike Clark*** (upon which the Government relies so heavily), there was a more pronounced danger that the witness' identification would really be based on his previous viewing of photographs - rather than his observation of the crime.**** Having identified the suspect twice before photographically, the Government would hardly have to make "suggestive influences" to ensure itself of yet another identification. See Mason v. U.S. 97 U.S.L.W. 1333 (August 6, 1969).

** Stovall v. Denno, 1388 U.S. 293 (1967).

*** Reported with Clemens v. United States _____ U.S. App. D.C._____, at 408 F.2d 1230., (1968).

**** In Clark there were two positive identifications and the total circumstances surrounding each identification (including the photographic) were evidently well established.

The Government makes much of the fact that the witness reported "a whole lot of people" came by him, and that no one told him that one of them would be the suspect. Appellant maintains, however, that the mere fact that a "whole lot of people" may have been present does not alter the eseential point. Here again, the Government asks us to assume from a record containing no information as to the composition of the "whole lot of people" that their general character and appearance closely enough approximated that of Appellant to make the witness' choice a true test of his recollection. Appellant was certainly singled out in one respect - the witness observed that he was obviously in custody of an officer. The record does not tell us in what other subtle ways he may have been singled out.

II. The Surprize Proceedings

The Government asserts that Appellants cannot be heard to complain of defects in the trial court's treatment of the "surprize" testimony since counsel at trial vigorously objected to the surprize instruction being given.

It should be noted that the insistance that the instruction not be given was not by counsel for Appellant Suggs, but rather for Appellant Harris. Suggs' attorney did, however, agree to the Court's ruling that "there will be no surprize" (Tr. 560). Appellant maintains that a fair reading of this proceeding indicates that as a result of the preliminary examination of the witness (by leading questions) the Court and counsel were made

to realize the Government was not, in fact, surprized, even though the Court had earlier ruled (Tr. 550) that there was surprize; and that consequently the point of counsel's objection to the surprize instruction was not to prevent proper instruction of the jury as to the nature of the testimony already elicited - but rather to prevent the Government from performing further examination by leading questions after it had developed that there was no genuine surprize by which this technique could be justified.

With regard to the third declaration of surprize by the Government, it is claimed (Gov't. Brief 15) that the prosecutor did not read from the statement but merely allowed him to read it to himself as a means of refreshing his recollection.

At Tr. 575, the prosecutor asked witness Allgood: "Q. No, did you tell him that the person was 5' 10"? Does that refresh your recollection? 5' 10" and 155 pounds, dark brown, wearing a green hat and light grey topcoat - did you tell him that?" Appellant submits that this technique constitutes leading the witness in the sense complained of.

Furthermore, the Government unfairly capitalized on the use of the previous statement by asking the witness on redirect examination as follows: "Q. So your memory was better on November 1, 1966, wasn't it, Mr. Allgood? We are two years now. Was your memory better then at the time you gave the statement and talked to the FBI?" - the witness, of course, acknowledged the truth of this. Appellant submits that this question could only have the effect of inviting the jury to consider the information on the FBI report a more valuable source of information than

the witness himself- notwithstanding repeated disclaimers by the witness that he had more than the haziest recollection of the events even when his memory was purportedly refreshed by reading of his earlier statement. (Tr. 572 - 581).

III. The Use of Harris' Statements Given the FBI.

The Government, in its Brief, seeks to justify the use of Harris' statements to the FBI Agent who interviewed him shortly after the crime was committed on the grounds that the statements were volunteered and in any case they were not the product of custodial interrogation. At the outset, it should be noted that the statement that Appellant's car had been stolen was not by itself damaging. The statement that it had been stolen prior to 7:00 a.m., at which time Appellant was seen in it, was the damaging admission - and this statement was not volunteered to the police dispatcher so far as the record discloses, but was rather told to the FBI Agent who appeared at the door during Harris' call to the police station. Appellant agrees with the Government that the statements he made to the police dispatcher were freely volunteered, and therefore not subject to the Miranda* admonitions regarding the manner of interrogating witnesses.

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* 384 U.S. 436 (1966).

The Government states the statement to the FBI Agent was volunteered; that the interrogation was not custodial in nature. This improperly places on defendant the necessity of establishing the character of the interrogation. Since the record reveals no details on this point, the Court must be viewed as having failed to adhere to the admonition of Pea v. United States, 397 F.2d 627, 130 U.S. App. D.C. 66 (1967) that the Judge affirmatively satisfy himself as to the voluntariness of a confession.

Had this procedure been properly observed, and the statement excluded from consideration, the "carefully woven web of circumstantial evidence" asserted by the Government (Gov't. Brief p. 17) would have been so fatally flawed as to require granting of Appellant's motion for acquittal at the close of the Government's case. Hence, any testimony adduced as a part of the Defendant's case (after denial of the motion) should not be considered in deciding this issue.

IV. The Question Of Delay in Trial

The Government states that most of the delay complained of is attributable to Appellants and they cannot therefore be heard to claim that they were fatally prejudiced. This overlooks the point that there are two Defendants and the (asserted) delicts of one should not be held to interfere with a claim of prejudice by the other. In this case, the Government correctly observes that Suggs sought and was granted various

continuances in discovery matters and in the trial date.* To say that the delays caused by these continuances cannot be complained of by a co-defendant, separately represented (at the trial level) is unjust. Accordingly, Appellant Harris should not be charged with any greater delay than he actually sought: to-wit, one ocontinuance in December, 1968, in the trial date, owing to illness of his counsel, and a seven-day continuance in determination of a motion for discovery occurring in July, 1967.

As for Appellant Suggs, the Government would cast the burden on him by comparing the length of delay caused by him to that caused by the Government. At Suggs' request, the trial was continued from October 11, 1968 to November 11, 1968. At Suggs' request, a hearing on his motion for discovery was continued several times. Other than these, most of the events regarded as significant by the Government concern appointment and withdrawal of a number of successive attorneys for Suggs. The Government attributes this succession of counsel to an apparent inability of Suggs to cooperate with counsel. This is not supported by the record. Simultaneous with the filing of this brief, Appellant's undersigned counsel is moving in the District Court to have additional documents certified to this Court as a part of the record in this case. These additional documents consist of four letters, all to the Chief Judge of the District Court, each from a different one of Suggs' appointed counsel. Three of

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* Appellant's Brief on Page 44 inadvertently contains the misstatement that Suggs only received one continuance. The Government's Brief, at page 9, correctly tabulated the various events.

these letters request that the writers be relieved of their Court appointment in this case, and state as reason for the requests that the writer is leaving the employ of the Legal Aid Agency. The fourth of these letters states that although the writer had enjoyed the confidence of Suggs, that since the writer had been in a member of the U. S. Attorney's office during the period when this case arose, and during its early stages, that Suggs felt a potential conflict, and to avoid any such possibility, the appointment should be vacated.

Accordingly, it is abundantly clear that the supposed inability to cooperate with court-appointed counsel that the Government relies on is not a ground for finding Suggs at fault in the delays.

As to who causes delay, the Government apparently believes that because the Government requested only one continuance, it caused delay only to the extent of the continuance. This, of course, is totally misleading. The Government includes not only the prosecution but the Courts, and the fact is that any intervening time between the indictment and the trial can be fairly charged to the Government whether or not it sought the delay or desired it, unless the delay was granted at the instance of the Defendant. Suppose, for instance, that for reasons beyond the control of the prosecutor, the Court calendar did not permit trial of a defendant for five years after indictment, during which time the defendant was ready for trial. Certainly the mere fact that the prosecution did not seek any delay would not mean that there had been no unconstitutional injustice done.

The Government asserts that no prima facie case of prejudice resulting from the delay has been made out. In addition to those factors brought out by Appellants' previous Briefs, it need only be reiterated here that the deterioration of the witnesses' memories was serious. The Government itself has to resort to assumptions that its own witness, adament and inflexible in his testimony, forgot the actual circumstances of the photographic identification. Appellant must accordingly have the right to wonder which other particulars testified to by Government witnesses are based on mistaken memories.

Conclusion

WHEREFORE, Appellants urge reversal of their convictions.

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